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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1928.

NO. [redacted] 114

FREDERICK C. RENZIEHAUSEN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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### Petition.

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petition of Frederick C. Renziehausen respectfully shows:

### Summary Statement of the Matter Involved.

The matter involved is (a) whether, under Section 214 (a) (8) of the Revenue Acts of 1918 and 1921, petitioner is entitled, in computing his taxable net income for the years 1918, 1919, 1920, and 1921, to deductions on account of obsolescence of trade marks, trade brands, trade names and good will of his distillery and wholesale liquor businesses, both of which were proscribed by Federal legislation; (b) whether, under the same sections of the same acts, petitioner is entitled to deductions for the same years on account of obsolescence of plant and equipment of his

distillery business; (c) whether petitioner is entitled to the benefit of the capital gain provision of Section 206 of the Revenue Act of 1921; and (d) (This point is alternative to point (a)) whether, under Section 214 (a) (4) of the Revenue Act of 1918, petitioner is entitled to a deduction for the year 1919 on account of the loss of said trade marks, trade brands, trade names and good will, based on cost, which was lower than the March 1, 1913 value thereof.

Petitioner is a resident of Pittsburgh, Pennsylvania, and during the years in question was the sole owner of The Large Distilling Company and a partner in the firm of Schuetz, Renziehausen & Company (R. 34).

The Large Distilling Company distilled rye whiskey under contract with wholesale liquor dealers. It also carried on a warehousing business. After the whiskey was distilled under contract, it was stored in bonded warehouses and there remained until withdrawn by the owners who held warehouse receipts for it and paid monthly storage charges therefor (R. 34).

The firm of Schuetz, Renziehausen & Company was engaged in the wholesale liquor business in Pittsburgh (R. 34).

On July 1, 1919 petitioner was compelled to discontinue the manufacture and sale of whiskey for beverage purposes by the so-called Wartime Prohibition Act (R. 39). This law was of a temporary character but on January 16, 1920, and before the temporary restrictions had been withdrawn, the constitutional amendment prohibiting the manufacture and sale of alcoholic beverages became effective, thus permanently destroying the business of petitioner, except for medicinal purposes, and that purpose in turn, was to all effects and purposes destroyed by the passage of the Willis-Campbell Act on November 23, 1921

(R. 40). By January 31, 1918, it was reasonably apparent that the constitutional amendment would be adopted. Petitioner became convinced in 1918 that the distillery part of his business was through for all time and that the business as a whole would be entirely wound up and liquidated within four years (R. 39).

Medicinal whiskey was manufactured in 1919, 1920 and 1921 but no whiskey has been manufactured since November 23, 1921 (R. 40).

Petitioner claimed a March 1, 1913 value of $1,000,000.00 for the trade marks, trade brands, trade names and good will of The Large Distilling Company (R. 27 (5)) and a March 1, 1913 value of $115,500.00 for the similar assets of Schuetz, Renziehausen & Company (R. 27 (6)). The respondent admitted the values in his brief filed with the Circuit Court of Appeals (R. 138).

Petitioner in 1908 commenced to invest his excess funds in whiskey, distilled by The Large Distilling Company, which he carried as an investment until maturity. This was a personal investment of the petitioners but for the purpose of convenience it was carried on the books of The Large Distilling Company, petitioner having for a long period of time carried personal investments on those books (R. 44). Part of the whiskey was sold in 1922 after being carried as an investment by the petitioner for a period of more than two years (R. 44).

The Large Distilling Company is and has been since 1921 in the process of liquidation (R. 42) under certain restrictions and limitations imposed by various Federal and State prohibition laws (R. 42).

The case was tried before the Board of Tax Appeals which body adjudged deficiencies of $174,159.60, $22,495.44, $156,362.99 and $67,745.39 for the years 1918, 1919, 1920 and 1922, respectively, and an overassessment for the year 1921 in the amount of $23,924.57 (R. 56).

A petition for review was filed (R. 68) and the judgment of the Board of Tax Appeals was reviewed and affirmed by the United States Circuit Court of Appeals for the Third Circuit (R. 137-142).

Your petitioner avers that the Board of Tax Appeals erred and was sustained in error by the Circuit Court of Appeals; (1) in holding that petitioner, under Section 214 (a) (8) of the Revenue Acts of 1918 and 1921, was not entitled to deductions from his gross income for the years 1918, 1919, 1920, and 1921 on account of obsolescence of trade marks, trade brands, trade names and good will of his distillery and wholesale liquor businesses; (2) in holding that petitioner, under the same sections of the same acts, was not entitled to deductions for the same years on account of obsolescence of plant and equipment of his distillery business; and (3) in holding that petitioner was not entitled to the benefit of the capital gain provision of Section 206 of the Revenue Act of 1921.

Your petitioner further avers that the Board of Tax Appeals erred in denying petitioner's alternative contention, that, under Section 214 (a) (4) of the Revenue Act of 1918, he was entitled to a deduction from his gross income for the year 1919 on account of the loss, based on cost which was less than the March 1, 1913 value, of the trade marks, trade brands, trade names and good will of his distillery business, and that the Circuit Court of Appeals erred in failing and refusing to pass upon this question.

## Reasons Relied on for the Allowance of the Writ.

1. The Circuit Court of Appeals in affirming the judgment of the Board of Tax Appeals and in refusing to permit petitioner to take deductions from gross income for the years involved on account of the obsolescence of

trade marks, trade brands, trade names and good will, has laid down a rule which is in conflict with the rule established by the Circuit Court of Appeals for the Second Circuit in *The Haberle Crystal Springs Brewing Company v. Clarke, Collector,* 30 F. 2nd 219. The Circuit Court moreover treated the Haberle decision as only a dissenting opinion.

2. The Circuit Court of Appeals has decided a doubtful question involving the construction of a taxing statute in favor of the Government and against the taxpayer contrary to the principle of law announced by this court in *Gould v. Gould,* 245 U. S. 151; *United States v. Merriam,* 263 U. S. 179; and *Bowers v. New York & Albany Lighterage Co.,* 273 U. S. 346.

3. The Circuit Court of Appeals in affirming the judgment of the Board of Tax Appeals and in holding that petitioner was not entitled to deductions from gross income on account of the obsolescence of plant and equipment of a distillery due to the assured passage of National Prohibition, has decided an important question of Federal law in a way probably untenable. The lower court assumes obsolescence to be the same as obsoleteness. The former is the state of becoming obsolete, the latter is the attainment of that state.

4. The question whether petitioner is entitled to the benefits of the capital gain provision of the Act of 1921 is one of far-reaching importance and is also one of first impression. The sale of assets in the course of liquidation amounts to no more than the realization and return of capital. It is not taxable except as the sale of a capital asset. The matter involves a determination of an important question of general law for the guidance of all taxpayers whose business is in liquidation.

5. The Circuit Court of Appeals failed to pass upon an alternative question fairly and properly presented to

it when it failed to decide whether petitioner was entitled to a deduction from gross income of the loss, based on cost which was less than the March 1, 1913 value, of the trade marks, trade brands, trade names and good will of the distillery business. This error, we respectfully submit, amounts to such a departure from the usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

6. All questions involved are of general importance. The same principles are involved in a number of cases now pending before the courts, the Board of Tax Appeals, and the Treasury Department. For the information of taxpayers generally all questions, we respectfully submit, should be authoritatively determined by this Court.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 3940 October Term, 1928, *Frederick C. Renziehausen, Petitioner, v. Commissioner of Internal Revenue, Respondent,* and that the said judgment of the United States Circuit Court of Appeals for the Third Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

FREDERICK C. RENZIEHAUSEN,

By WILLIAM A. SEIFERT,

WILLIAM WALLACE BOOTH,
*Counsel for Petitioner.*

## BRIEF IN SUPPORT OF PETITION.

### I.

### Opinions Below.

The opinion of the Board of Tax Appeals (R. 31) is reported at 8 B. T. A. 87. The opinion of the Circuit Court of Appeals is not yet reported but is found in the Record at pages 137-142.

### II.

### Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on March 7, 1929 (R. 142). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, section 1, 43 Stat. 938, and under Section 1003 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 10.

### III.

### Statement of the Case.

A statement of the case appears in the petition and in the interest of brevity is not repeated.

### IV.

### Specification of Errors.

1. The Circuit Court of Appeals erred in holding and deciding that the March 1, 1913 value of the trade marks, trade brands, trade names and good will of a distillery and of a wholesale liquor business were not subject to obsolescence as a result of federal legislation which proscribed such businesses.

2. The Circuit Court of Appeals erred in holding and deciding that the depreciated value of the plant and equipment of a distillery was not subject to obsolescence as a result of federal legislation which proscribed such business.

3. The Circuit Court of Appeals erred in holding and deciding that a taxpayer, sole owner of a distillery, is not entitled to be taxed at the capital gain rate on profit derived from the sale of whiskey held by him as a personal investment for more than two years.

4. The Circuit Court of Appeals erred in holding and deciding that a taxpayer is not entitled to be taxed at the capital gain rate on profits derived from the sale of assets during the process of forced liquidation.

5. The Circuit Court of Appeals erred in failing or refusing to pass upon the question (alternative to Error 1) whether a taxpayer is entitled to deduct from his gross income as a loss the cost of the trade marks, trade brands, trade names and good will of his distillery business which was proscribed by federal legislation.

## V.

## Argument.

### AS TO OBSOLESCENCE OF INTANGIBLES.

The decision of the Circuit Court of Appeals in the instant case is directly in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *The Haberle Crystal Springs Brewing Co. v. Clarke,* 30 F. 2nd 219.

We respectfully submit that the correct principle for the solution of this question is to be found in the decision in the *Haberle* case, *supra* and in the dissenting opinion of the Board of Tax Appeals in the *Manhattan Brewing Company* case, 6 B. T. A. 952.

Prior legislation and the construction of the Act of 1918 by the Treasury department confirm the intention of Congress to grant such deductions.

Advisory Tax Board Memorandum 44 (C. B. 1, p. 133).

Bulletin F, "Depreciation and Obsolescence".

Article 163, Regulations 45.

O. D. 472, C. B. 2, p. 141.

O. D. 298, C. B. 1, p. 138.

Law Opinion 862, C. B. 1, p. 127.

Dissenting opinion of Mr. Trammell in *Manhattan Brewing Company* case, *supra.*

Intangible assets are subject to exhaustion. The statute is silent on the nature of the assets subject to exhaustion, wear and tear, including obsolescence. The only requirement is that they be used in the business. The exhaustion, wear and tear does not have to be the result of use in the business. Wear and tear relate to physical life. Exhaustion and obsolescence relate to economic or commercial life. Intangible assets can become exhausted, destroyed and obsolete even as tangible assets.

The conflict of authority on this question shows the doubt that exists as to the intention of Congress. All doubts involving the construction of taxing statutes are to be resolved in favor of the taxpayer. A taxing statute is not to be extended beyond its clear import. There is no clear import here that Congress intended to allow a deduction for obsolescence of tangible property and not for intangible property. *Gould v. Gould,* 245 U. S. 151; *United States v. Merriam,* 263 U. S. 179; *Bowers v. New York & Albany Lighterage Co.,* 273 U. S. 346.

**AS TO OBSOLESCENCE OF TANGIBLES.**

The Circuit Court of Appeals held that because the plant and equipment were being used until the passage of the Willis-Campbell act they were not obsolete. The

manifest error, we submit, is in the assumption that the deduction was for obsoleteness, rather than for obsolescence. The deduction for obsolescence is valid even though the property is still being used in the business. It is allowed to compensate for a reasonably foreseen loss of useful value prior to natural life and due to economic or commercial causes.

If the decision in the instant case be permitted to stand it will in all probability mean that the Treasury Department will allow no taxpayer any deduction for obsolescence until the property has become obsolete. That deduction is provided for in another section of the act.

**AS TO CAPITAL GAIN.**

This question, whether stock in trade or inventory becomes a capital asset immediately upon the cessation of the usual course of business and the beginning of forced liquidation, is one of first impression. It is also one of great importance in the general law of the land. An authoritative decision is needed for the guidance of all taxpayers whose business is in liquidation.

It involves a construction of Section 206 of the Revenue Act of 1921, a beneficial provision to aid and assist those who have capital assets for sale. It was passed with the intention of relieving from the burden of the high tax brackets, those whose profit was derived from a single transaction and not from recurring transactions. A taxpayer in liquidation has no means of making a profit from recurring transactions or from a continuing business. When his assets are sold he has no further means of replenishing them and thus continuing in business for profit. Hence Congress said he shall not be required to pay the high tax. A decision to the contrary, we respectfully submit, would violate the spirit of the act and the intent of the legislative body.

**AS TO LOSS OF INTANGIBLES.**

This question is alternative to the first and principal question involved. Petitioner contended that if he were not entitled to deductions from gross income on account of the obsolescence of intangibles, he was entitled to a deduction in the year 1919, the year in which it was reasonably foreseen that his business would be proscribed by the ratification of the Eighteenth Amendment, on account of the loss, based on cost which was less than the March 1, 1913 value, of the trade marks, trade brands, trade names and good will of his distillery business.

The Board of Tax Appeals held, as a matter of law, that the ratification of the Eighteenth Amendment on January 16, 1919 did not destroy the business of The Large Distilling Company or render its intangibles obsolete because it continued to manufacture whiskey for medicinal purposes until November, 1921 (R. 45, 46, 47).

The question was fairly and properly presented to the Circuit Court of Appeals (R. 75) but that Court failed to pass on the question in any manner whatsoever. The failure of the lower appellate court to pass upon a question properly presented to it amounts, we most respectfully submit, to such a departure from the usual course of judicial procedure as to call for the exercise of this Court's power of supervision.

If petitioner is denied both his first point and this alternative point he is left in the anomalous position of having lost a valuable capital asset without the right to take any deduction whatsoever therefor from this gross income in the year he sustained the loss.

**CONCLUSION.**

Because of the far-reaching effect of the opinion below; because of its conflict with a decided case in another circuit; because of its failure to construe a doubtful statute

in favor of the taxpayer; because the Court below failed to pass upon a question properly presented to it; because of the manifest importance of an authoritative rule for the guidance of all taxpayers, who had formerly been engaged in the distilling business or whose business is in liquidation; and because the matters involved are of great importance in connection with the revenue laws and of such novelty and general interest as to merit a review of the case by this Court, it is most respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM A. SEIFERT,
WILLIAM WALLACE BOOTH,
*Counsel for Petitioner.*

## APPENDIX.

### Statutes Involved.

Section 214 (a) (4), Revenue Act of 1918

"(a) That in computing net income there shall be allowed as deductions (4) losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in a trade or business; * * *"

Section 214 (a) (8) Revenue Act of 1918

"(a) That in computing net income there shall be allowed as deductions: (8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business including a reasonable allowance for obsolescence. In the case of such property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 8, 1913."

Section 206 (a) (6) Revenue Act of 1921

"(a) That for the purpose of this title: (6) The term 'capital assets' as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years (whether or not connected with his trade or business), but does not include property held for personal use or consumption of the taxpayer or his family, or stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year."

Section 206 (b) Revenue Act of 1921

"(b) In the case of any taxpayer (other than a corporation) who for any taxable year derives a capital

net gain, there shall (at the election of the taxpayer) be levied, collected and paid, in lieu of the taxes imposed by sections 210 and 211 of this title, a tax determined as follows: A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner provided in sections 210 and 211, and the total tax shall be this amount plus 12½ per centum of the capital net gain: but if the taxpayer elects to be taxed under this section the total tax shall in no such case be less than 12½ per centum of the total net income. The total tax thus determined shall be computed, collected and paid in the same manner, at the same time and subject to the same provisions of the law, including penalties, as other taxes under this title."

Section 214 (a) (8) Revenue Act of 1921

"(a) (8) That in computing net income there shall be allowed as deductions: (8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of such property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913."